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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

COMMENTS OF THE ASSOCIATION FOR
LOCAL TELECOMMUNICATIONS SERVICES

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List

SUMMARY

In many circumstances carriers' ability to provide service in a timely, efficient and cost effective manner has been hampered by municipal ordinances (and, sometimes, state laws) that make it difficult, time consuming, and costly to use the municipal rights-of-way for the provisioning of facilities. The members of ALTS do not share the Commission's apparent belief that the vast majority of municipalities are managing their rights-of-way in an efficient, competitively neutral manner. Rather, carriers have found hundreds of municipalities considering and often adopting regulations or ordinances that have had a chilling effect upon provision of service. In addition to exorbitant fees, some municipalities have imposed a broad range of regulations that are often duplicative of the state's regulatory role and encroach upon the states role of regulating intrastate communications. Carriers are often left with three undesirable choices: agreeing to onerous terms just to be able to provide service, engaging in expensive, protracted litigation, or simply abandoning plans to provide service in the particular community.

The members of ALTS understand that if they (or any other carrier) construct facilities in public rights-of-way they should repair the rights-of-way. Enforcement of the cities' right to insist that streets are returned to a state close to what it was prior to the construction is not at issue. In addition, the members of ALTS would not challenge a permitting fee that is administered in a nondiscriminatory manner and is directly related to the costs incurred to manage the public rights-of-way. No carrier, however, should be subject to different standards or requirements than other carriers, thus putting some carriers at a significant competitive disadvantage *vis-a-vis* the other carriers. And no carrier should be subject to fees or requirements that are wholly unrelated to reasonable regulation of the public rights-of-way.

There have been a number of instances in the past three years in which carriers have sued

local governments over their rights-of-way management practices. Although the majority of the court decisions to date have been relatively favorable to carriers and have articulated reasonable limits on municipalities' authority to regulate the use of rights-of-way, carriers (and the public waiting for their services) should not have to wait the several years it may take to come to consensus in the courts as to the meaning of Section 253(c) of the Act and the actions that are appropriate thereunder. Therefore, the Commission must reaffirm and expand upon its earlier decisions on the permissible scope of right-of-way regulation and take additional measures that would eliminate the continued need for lengthy negotiations and/or district-by-district litigation. In addition, the Commission must work more closely with state and local governments to ensure reasonable rules relating to construction in and use of public rights-of-way. If the Commission can do that all carriers and the public will be the ultimate beneficiaries.

The principles that the Commission should articulate and adopt are the following:

1. Local rights-of way management must be administered in a nondiscriminatory and competitively neutral manner. Therefore, any local requirements must be imposed under ordinances, regulations and rules of general application. Any requirement or fee that applies to one category of carrier that does not apply to another category of carrier is presumptively discriminatory and preemptable under Section 253 of the Telecommunications Act of 1996 and general principles of federal preemption. The Commission should also make it clear that it stands ready to act expeditiously on any case brought to its attention.

2. Municipalities must rule on applications to construct facilities within a reasonable period of time (30 days is presumptively reasonable) and may not unreasonably deny carriers permission to construct facilities in the municipal rights-of-way.

3. Regulation of interstate telecommunications services is under the exclusive jurisdiction of the Federal Communications Commission and may not be regulated in any manner by a state or a political subdivision thereof unless the Federal Communications Commission has explicitly delegated authority thereto. With respect to intrastate services, state laws control, but a locality may not regulate intrastate communications in any manner unless there is explicit state statutory authority to do so (and, of course, such regulation may not be inconsistent with federal rules and requirements).

4. Municipal regulation of use of the rights-of-way is limited to reasonable regulation of the time, place and manner of construction of facilities. This would include such things as preservation of the physical integrity of streets and highways, control of the orderly flow of vehicles, coordination of construction schedules, and determination of reasonable bonding and indemnity requirements. This would not include such things as regulation of services, information requirements that are unrelated to the scope of the proposed construction, universal service requirements, or any interconnection requirements.

5. Fees relating to the use of public rights-of-way should be limited to recovery of the actual costs of administering the rights-of-way and ensuring appropriate restoration of the rights-of-way. To the extent that performance or other bonds are required, they must be limited to the amount necessary to ensure compliance with restoration requirements. All such fees must be publicly disclosed and should be recovered in a competitively neutral manner.

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COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

The Association for Local Telecommunications Services ("ALTS") pursuant to the Notice of Proposed Rulemaking and Notice of Inquiry (hereinafter "Notice of Inquiry") in the above captioned proceeding and Public Notice DA 99-1563, released August 6, 1999, hereby files its initial comments on access to public rights-of-way and the municipal regulation of, and fees charged to, carriers for such access.[1]

I. INTRODUCTION AND SUMMARY

The members of ALTS have found that in many circumstances their ability to provide service in a timely, efficient and cost effective manner has been hampered by municipal ordinances (and, sometimes, state laws) that make it difficult, time consuming, and costly to use the municipal rights-of-way for the provisioning of facilities. Three years after the passage of the Telecommunications Act of 1996 and after many negotiations with numerous municipal governments, the members of ALTS do not share the Commission's apparent belief that the vast

[1] ALTS previously filed comments and replies (on Aug. 27, 1999 and Sept. 27, 1999 respectively) on the building access issues raised in these same dockets.

majority of municipalities are managing their rights-of-way in an efficient, competitively neutral manner.

Rather, the members of ALTS have found that significant numbers of municipalities have been very wary of CLECs and/or have seen them as a potential new source of revenue. These attitudes have resulted in hundreds (and possibly thousands) of municipalities considering and often adopting regulations or ordinances that have had a chilling effect upon competition. In addition to exorbitant fees, some municipalities have imposed a broad range of regulations that are often duplicative of the state's regulatory role and encroach upon the states role of regulating intrastate communications.[2] Even though the carriers (including CLECs and ILECs) have sometimes prevailed upon the local governments not to adopt the more onerous provisions considered,[3] the Commission should recognize that significant resources have been expended by the entire industry simply attempting to hold back the flood of new ordinances. In addition, of course, carriers often have not been successful in convincing the municipalities to enact

[2] Some ordinances (e.g. that of Springfield, Oregon) can be read to give the authority to the municipality to grant or deny the ability of the carriers to provide service. In virtually all states this authority rests with the public utilities commission, not the local governments.

[3] A number of times, municipalities have agreed to less onerous conditions after suit has been filed against them. In Missouri, for example, NEXTLINK was forced to file a complaint for declaratory and injunctive relief against the cities of Maryland Heights and University City when those cities refused to grant NEXTLINK permission to use the public rights-of way under the same terms and conditions that Southwestern Bell uses the public rights-or-way. After the suit was filed, University City agreed to settle on terms and conditions that were similar to those reached by other municipalities in the area, but which included a fee for use of the rights-of-way, a fee that is not imposed on Southwestern Bell. Likewise, Maryland Heights settled the preliminary injunction, on an interim basis, with an agreement that treats NEXTLINK similarly to Southwestern Bell with respect to recurring fees for the use of the rights-of-way. See Appendix A.

reasonable ordinances. In those cases, carriers are left with three undesirable choices: agreeing to onerous terms (that often place them at a competitive disadvantage *vis-a-vis* the incumbent) just to be able to provide service, engaging in expensive, protracted litigation, or simply abandoning plans to provide service in the particular community.

States have an interest in ensuring that municipal regulation of the use of public rights-of-way is relatively uniform, does not burden telecommunications carriers, and does not duplicate the states' regulatory role. Therefore, there has been movement in some state legislatures in the past three years for the adoption of state statutes that would ensure that access to public rights-of-way is administered in a reasonable, predictable and non-discriminatory manner.[4] While there has been progress made in this area and a number of state statutes improve on the pre-existing status quo,[5] far fewer than half the states have managed to pass legislation and there has not been uniformity in the statutes that have been passed.[6] In addition, some state statutes that have been

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[4] In early 1997 and 1998 an ad hoc industry group, of which ALTS, most of the ILECs, IXCs and USTA are members, worked on a set of principles that the group submitted to the American Legislative Exchange Council ("ALEC"). The ad hoc group worked with ALEC to try to encourage the passage of legislation on rights-of-way issues. The principles adopted are appended to these comments.

[5] The Michigan Telecommunications Act, Article 2A, Act mandates that local governments rule on access to rights-of-way within 90 days of submission of an application and provides that access may not be unreasonably denied by the local government. Any fees must be levied on a non-discriminatory basis and must not exceed the fixed and variable costs to the local government for maintaining the rights-of-way. Of course, the Michigan Act will sunset in two years. A bill introduced into the Michigan House this year (HB 4804) would have decreased the amount of time that a local government had to rule on access requests to 30 days. Fees would have been limited to "actual" costs rather than "fixed and variable" costs.

[6] Appendix B to these comments contains information on the statutes of which ALTS is aware. There may be other state legislatures that are working on these issues of which ALTS is

passed in the past several years have significant discriminatory provisions in them. And, in some states that have passed legislation limiting the ability of local governments to unreasonably manage their rights-of-way, cities have disregarded the legislation and passed ordinances that violate state law.[7] Therefore, this Commission cannot conclude that the problems that do exist for carriers will be quickly (or uniformly) resolved by state legislators.

In addition to state legislatures, there have been some state public utility commissions that have taken actions to address the rights-of-way issues. For example, in California the PUC in Docket 98-10-058, when faced with complaints from carriers about excessive fees, held that while municipalities have an interest in managing local rights-of-way, the State has "an interest in removing barriers to open and competitive markets and in ensuring that there is recourse for actions which may violate state and federal laws regarding nondiscriminatory access and fair and reasonable compensation." Therefore, the California PUC decided that it could intervene in disputes over municipal rights-of-way access "when a party seeking ROW access contends that local action impedes statewide goals, or when local agencies contend that a carrier's actions are

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unaware. It should also be noted that in at least one case municipalities have sued to overturn legislation on rights-of-way. In City of Dublin v. The State of Ohio, 99CVH-08 7007 (Court of Common Pleas, Franklin County, Ohio, filed Aug. 25, 1999) the cities of Dublin and Upper Arlington, Ohio seek declaratory and injunctive relief against the new statute in Ohio (see appendix B) on the basis that the statute unlawfully eliminates or severely restricts the ability of Ohio municipalities to manage their rights-of-way.

[7] As indicated in the Appendices attached hereto, the city of Denver enacted an ordinance that has been found violative of the Colorado statute.

frustrating local interests."[8] The Minnesota PUC has an ongoing docket to consider adoption of rules governing rights-of-way use. Minn. PUC Docket No. U-999/r-97-902. And, we understand that the Wisconsin Public Service Commission has indicated an intention to commence a proceeding on the costs of maintaining the public rights-of-way. Some state statutes specifically give the state regulatory commissions jurisdiction over rights-of-way issues,[9] but others either deny the commission authority or are silent or ambiguous as to the commission's authority.

In addition to the time and effort expanded in negotiating with individual municipalities and working with state legislators, there have been several instances in which carriers have decided that their only recourse is to file suit against a municipality. These decisions are not made lightly; it is always preferable to work out differences in an amicable manner with the municipalities with whom the carrier clearly needs to have a long-term relationship. Nonetheless, in a number of municipalities across the country carriers have felt that there is no alternative left to them and have filed suit against the municipality. In addition to the cases that the Commission cited in its NOI, there are several others that have been filed and of which ALTS

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[8] Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service m, R.95-04-043 (CPUC, filed April 26, 1995) at 39. The net effect of the Commission's assertion of jurisdiction over these disputes is not clear, however, because the commission concluded that it lacks jurisdiction to "directly order a local government body to grant access." Therefore, the Commission left it to the carriers to attempt to force the municipality to comply with any Commission order. This obviously could leave a carrier in a very awkward situation and result in a carrier having to sue a municipality to enforce a Commission "declaration" that the carrier has the right to use the rights-of-way.

[9] An Indiana statute for example gives the Indiana URC authority over "unreasonable" municipal ordinances for right-of-way issues.

is aware.[10] Although the majority of the court decisions to date have been relatively favorable to carriers and have articulated reasonable limits on municipalities' authority to regulate the use of rights-of-way, carriers (and the public waiting for their services) should not have to wait the several years it may take to come to consensus in the courts as to the meaning of Section 253(c) of the Act and the actions that are appropriate thereunder.

The members of ALTS understand that if they (or any other carrier) construct facilities in public rights-of-way they should repair the rights-of-way. Enforcement of the cities' right to insist that streets are returned to a state close to what it was prior to the construction is not at issue. In addition, the members of ALTS would not challenge a permitting fee that is administered in a nondiscriminatory manner and is directly related to the costs incurred to manage the public rights-of-way. No carrier, however, should be subject to different standards or requirements than other carriers, thus putting some carriers at a significant competitive disadvantage *vis-a-vis* the other carriers.[11] And no carrier should be subject to fees or requirements that are wholly unrelated to reasonable regulation of the public rights-of-way.

The examples of burdensome municipal regulations contained in these comments and comments that ALTS understands are being submitted by other parties should convince the Commission that additional action from it is necessary to foster the competitive environment

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[10] The lawsuits filed and the cases decided of which ALTS is aware are briefly described in Appendix A.

[11] The Commission has already made it clear that discriminatory ordinances violate the Act. See Notice at ¶ 76; TCI Cablevision, 12 FCC Rcd 21396, at ¶ 107-09 (1997), recon. denied 13 FCC Rcd 16400 (1998); Silver Star Telephone Co., 1998 FCC LEXIS 4358 ¶10 (Aug. 24, 1998).

envisioned by the 1996 Act.[12] There is sufficient information for the Commission to take action in this area.[13] The members of ALTS who are spending significant resources and time negotiating with cities believe that this is one of the biggest bottlenecks preventing the rapid growth of facilities-based competition. Although the Commission and the courts have several times articulated what they believe are the limits of the municipalities' police powers to manage the rights-of-way and some state legislatures have attempted to pass legislation that would make municipal regulations more consistent throughout a state, new ordinances are being proposed all the time. And, it appears that the drafters of the new ordinances are either unaware of the Commission and court precedent in this area or simply do not care what that precedent teaches.

Thus, the Commission must reaffirm and expand upon its earlier decisions on the permissible scope of right-of-way regulation and take additional measures that would eliminate

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[12] The Commission should be aware that, in addition to the number of burdensome situations detailed in the various comments, there are other examples that could be brought to light, but have not been because the carriers involved have settled with the particular municipality. At the same time, the Commission should understand that the fact that a carrier has signed an agreement with a city does not mean that the agreement is not burdensome. Many times carriers have made the business decision that it is better to sign a bad agreement and be able to complete its business plans and provide service than to continue to incur the expense and delay of fighting the municipality. The Commission should not assume that the problems on which it receives comments in this proceeding are necessarily reflective of the numbers of municipalities in which carriers are having difficulties or even that those problems are reflective of all the types of problems that carriers incur. In fact, many agreements include a statement that the carrier is entering the agreement without qualification or reservation, thereby making it much more difficult to contest the agreement in court.

[13] It is not possible to determine how often carriers have simply given up the quest of providing service in a particular city rather than agreeing to onerous provisions for the use of the right-of-way. We note, for example, that there are no facilities-based competitive providers of service in Sante Fe, New Mexico, a city with restrictive requirements, and a city that would be a likely target for competitors, due to its status as a state capitol and its relative wealth.

the continued need for lengthy negotiations and/or district-by-district litigation. While we are under no illusion that the adoption of federal rules or the restatement of principles already articulated will solve all of the carriers' issues with municipalities, we strongly believe that if the Commission works more closely with state and local governments, working to ensure reasonable rules relating to construction in and use of public rights-of-way, all carriers and the public will be the ultimate beneficiaries.

The principles that the Commission should articulate and adopt in a declaratory ruling are the following:

> 1. Local rights-of way management must be administered in a nondiscriminatory and competitively neutral manner. Therefore, any local requirements must be imposed under ordinances, regulations and rules of general application. Any requirement or fee that applies to one category of carrier that does not apply to another category of carrier is presumptively discriminatory and preemptable under Section 253 of the Telecommunications Act of 1996 and general principles of federal preemption.[14] The Commission should also make it clear that it stands ready to act expeditiously on any case brought to its attention.
>
> 2. Municipalities must rule on applications to construct facilities within a reasonable period of time (30 days is presumptively reasonable) and may not unreasonably deny carriers permission to construct facilities in the municipal rights-of-way.
>
> 3. Regulation of interstate telecommunications services is under the exclusive jurisdiction of the Federal Communications Commission and may not be

[14] One argument that competitive carriers often encounter is that the CLECs are not similarly situated to the ILECs and therefore differing treatment is not "discriminatory." The Commission should make it clear that any carrier that has the necessary state and federal authorizations to provide service is similarly situated for the purposes of using the public rights-of-way. The only distinction that should be made between certificated carriers should be based only upon differences in the manner in which the carriers disturb or use the rights-of-way. The cities' interests in the carriers use of the rights-of-way is limited to the effect that construction has on the health and welfare of the citizens, not what types of service the carrier will provide.

regulated in any manner by a state or a political subdivision thereof unless the Federal Communications Commission has explicitly delegated authority thereto. With respect to intrastate services, state laws control, but a locality may not regulate intrastate communications in any manner unless there is explicit state statutory authority to do so (and, of course, such regulation may not be inconsistent with federal rules and requirements).

4. Municipal regulation of use of the rights-of-way is limited to reasonable regulation of the time, place and manner of construction of facilities. This would include such things as preservation of the physical integrity of streets and highways, control of the orderly flow of vehicles, coordination of construction schedules, and determination of reasonable bonding and indemnity requirements. This would not include such things as regulation of services, information requirements that are unrelated to the scope of the proposed construction, universal service requirements, or any interconnection requirements.

5. Fees relating to the use of public rights-of-way should be limited to recovery of the actual costs of administering the rights-of-way and ensuring appropriate restoration of the rights-of-way. To the extent that performance or other bonds are required, they must be limited to the amount necessary to ensure compliance with restoration requirements. All such fees must be publicly disclosed and should be recovered in a competitively neutral manner.

To work more closely with state and local governments to ensure that the federal principles adopted are followed, the Commission should consider taking any or all of the following actions. ALTS suggests these actions only as a sample of what the Commission could do. There may be additional actions that the Commission can take to ensure compliance with the federal principles and the Commission should consider any proposal that will ensure that states and municipalities understand the importance of and necessity for fair, reasonable, and nondiscriminatory rights-of-way regulation. The Commission could, within its new Enforcement Bureau, appoint an FCC "point person" or "ombudsman" or even a division within the Enforcement Bureau, to work with the cities and carriers to solve specific disputes. The "point person" could also work with NARUC and the state legislative bodies to try to find

broader solutions to issues raised. Second, the Commission could convene a right-of-way public forum where all parties could present ideas and solutions to the legitimate interests of all parties.

The following is a sampling of particular unreasonable municipal regulations under the following subsets: 1) requirements that apply only to CLECs or that apply in a discriminatory manner to CLECs *vis-a-vis* ILECs; 2) fees that are wholly unrelated to the municipality's cost of managing the rights-of-way and thus result in a tax, which many times is illegal under state statutes; 3) inordinate delay in grant of a permit or "franchise"; and 4) attempts to regulate services.

I. DISCRIMINATORY PRACTICES

Perhaps the most blatant type of discrimination is in the levying of fees that apply to one type of carrier (usually the CLEC) that do not apply to other carriers (usually the ILECs) or the application of differing fees to carriers. Generally, these are the recurring fees that are based either upon a percentage of revenue or linear feet of facilities.[15] There may also be in kind payments that are required of some carriers but not others. There are other types of discrimination also. The simple requirement to obtain a "franchise" is often placed on CLECs, but not on ILECs and, even when the ILEC is required to obtain a "franchise," sometimes there

[15] There are generally four types of fees that a city may levy upon carriers: 1) an application fee for permission to construct facilities in the rights-of-way, 2) acceptance fees, 3) annual fees that are often levied either on a linear foot or percentage of gross revenue basis and 4) transfer fees. The application fees can be as high as $10,000, acceptance fees have been as high as $100,000 and the recurring fees range from a couple percentage points to as high as 15% of gross revenues. In addition, of course, many municipalities require carriers to provide free service or other non-monetary compensation.

are application requirements that are imposed on some but not all carriers. Finally, sometimes there are technical requirements placed on some carriers but not others. For example, there have been instances where competitive carriers are required to place their facilities underground while the incumbents are allowed to continue to place new facilities above ground. [16]

In New York City, Bell Atlantic does not have a franchise agreement and does not pay any recurring fees to the city for the use of its rights-of-way. All CLECs have been required to negotiate with the city and have been required to sign a franchise agreement that includes a number of onerous terms and conditions. In addition, CLECs are required to pay a recurring (yearly) franchise fee of 5% of gross annual revenues.[17]

In Baltimore, Maryland, Bell Atlantic does not have a formal agreement with the City but, pursuant to decades old ordinances, pays an annual fee slightly more than $0.06 per foot of right-of-way occupied, regardless of the number of conduits. The city gives CLECs three options for use of the public rights-of-way. CLECs may (I) lease city-owned duct at the rate of $0.207 per foot of conduit per year, (ii) pay all construction costs of new facilities but the city will have title to the facilities and the CLEC is obligated to lease the facilities from the city at the rate of $0.22 per foot of conduit per year, or (iii) pay all construction costs of the new facilities

[16] It is not only the discriminatory nature of these practices to which ALTS objects. We do not seek to have the municipalities levy unreasonable fees or impose unreasonable practices on the ILECs. Rather, no carrier should be required to pay unreasonable fees or be subject to unreasonable regulation. However, the discrimination makes it almost impossible for the newer carriers to compete.

[17] Some agreements provide a floor for the annual payment. Interexchange carriers are required to pay a recurring fee of $3.00 per linear foot of public right-of-way for the system.

and retains title to the facilities but must pay the City an annual recurring fee equal to $4.50 per foot of conduit.[18]

In Greensboro, North Carolina, CLECs have been compelled to sign agreements that provide that the "franchisee" shall pay to the City a "franchise fee" of five percent of gross annual revenues and shall furnish a performance bond of $50,000 to guarantee the faithful performance of all the franchisee's obligations. In addition, CLECs are required to install and maintain capacity on their systems to municipal locations to be used for noncommercial educational and governmental purposes. The institutional network is to be constructed at no cost to the City. The ILEC in Greensboro, BellSouth, does not appear to pay a recurring fee to the city or be subject to any of the other obligations.[19]

In White Plains, New York, as indicated by a complaint filed by AT&T, TCG/AT&T has been attempting to obtain permission to construct facilities for seven years. Yet, despite repeated requests, the company has been unsuccessful in coming to agreement with the city. One important stumbling block is the city's insistence that TCG/AT&T pay the city an annual franchise fee of five percent of "gross revenues" even in the event that a court declares such a franchise fee illegal and construct, at its own expense, underground conduit for the city. The

[18] Because the city owns duct, it is very reluctant to allow new entrants to construct their own facilities.

[19] The Greensboro Code, adopted in 1995, provides that the "grantee of any franchise hereunder shall pay to the city a franchise fee in the amount specified in the franchise." Thus, the "franchise fee" is to be set at whatever amount the city can extract from the carrier. This, obviously, will depend upon the political power of the carrier and the carrier's need to provide service in a certain time frame.

incumbent, NYNEX does not have a franchise agreement with the City of White Plains and, as far as TCG/AT&T has been able to determine, the city has not required NYNEX to pay a five percent fee on NYNEX's gross revenues.[20]

In New Orleans, Louisiana, the rights-of-way ordinance specifically exempts the incumbent carrier, BellSouth, from many of the provisions. Specifically, BellSouth escapes the 5% franchise fee that is levied on other carriers. It is ALTS' understanding that BellSouth does pay an annual recurring fee, but it is in the range of two to three percent of revenues. In addition, the New Orleans ordinance allows the city to require in-kind and connectivity requirements of new carriers, that specifically do not apply to the incumbent.

In Detroit, Michigan, Ameritech does not appear to have a franchise agreement and Ameritech does not appear to pay any recurring rights-or-way or application fees to the city. All CLECs are required to follow a very detailed and costly procedure for right-of-way access and authorization from the city can take months. In addition, the CLECs must pay an annual recurring fee to the City based upon the amount of linear feet of occupied public right-of-way. This is despite a state statute that limits fees to be charged carriers to the fixed and variable costs attributable to the management of the rights-of-way.[21] In other cities in Michigan, including Troy and Madison Heights, the local governments are charging CLECs $10,000 application fees,

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[20] *See* TCG New York v. City of White Plains, 99CIV-4419 (S.D.N.Y., complaint filed June 18, 1999)

[21] The City of Dearborn has conducted a cost study in relation to the court case that it has with TCG. We note that in that cost study, the city attributed over 50 percent of the entire city legal budget to rights-of-way issues. See TCG Detroit v. City of Dearborn. 16 F. Supp.2d 785 (E.D. Mich. 1998), appeal pending.

but Ameritech appears to pay nothing.

In Salt Lake City, Utah, U S WEST does not have a franchise agreement and does not appear to pay any recurring rights-of-way fees. CLECs are required to execute a franchise agreement with the City and pay a recurring fee of 6% of their gross revenues to the city. CLECs are required to share conduits to reduce the right-of-way encroachments but it does not appear that the city has forced U S WEST to share conduits with other carriers.

In the St. Louis metropolitan area, Southwestern Bell does not have a franchise agreement with any of the municipalities and does not pay any fee for use of the rights-of-way.[22] Further, in the municipalities that charge a per linear foot fee, CLECs are again singled out *vis-a-vis* competitive access providers ("CAPS") and are required to pay a fee that is approximately three and one half times the amount that the CAPs pay for use of the rights-of-way.

Finally, it should be noted that in 1998 the Public Utilities Commission of Texas did a study of the municipal franchise agreements of the various cities in Texas. That study shows that a number of cities in Texas (including Addison, Arlington, Houston, La Marque and Harlington) were collecting fees on different bases from the different carriers.[23] The Texas legislation passed

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[22] To date, all the St. Louis area municipalities that impose rights-of-way fees allow a credit for payments made under the respective municipalities' utility tax against the rights-of-way fee. Although this offset will neutralize the effect of the rights-of-way fee *vis-a-vis* Southwestern Bell at a certain revenue level, this fee may never be neutralized in those municipalities where the CLEC has few, if any customers. In one largely residential municipality, one CLEC will need to generate over a half a million dollars in local exchange business in order for the utility tax to completely offset the rights-of-way fee.

[23] See Report to the Interim Committee on Municipal Franchise Agreements, June 1, 1998. For example, in Addison, Southwestern Bell pays a flat fee (with a growth factor) and new carriers pay five percent of gross revenues; in Arlington, Southwestern Bell pays four percent of

just this year mandates that these fees be replaced with the new fees to be set by the Texas PUC.

In addition to the cities that levy differing fees upon carriers, some state statutes contain discriminatory provisions. Two Arizona statutes that authorize the licensing (and franchising) of telecommunications providers expressly exempt any company that was providing service in the state prior to the effective date of the Arizona Constitution. These are the statute relating to fiber optics (A.R.S. Sec. 9-565(B)) and the statute relating to local telecommunications services, A.R.S. Section 9-561 et seq. U S WEST qualifies for this exemption and most other telecommunications providers do not. Under the Fiber Optics statute, therefore, CLECs that have interstate fiber optic systems are required to pay a permit fee that U S WEST is not required to pay. As a result, in Phoenix, for example, CLECs are typically paying an annual fee based on a percentage of gross revenues or linear feet of facilities.[24] In Tucson, the Master Franchise Ordinance provides that CLECs will pay a franchise fee equal to 5 ½ percent of gross revenues and CLECs have been required to fund in-kind projects for connecting and wiring city buildings.[25]

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gross revenues and Brooks Fiber pays $1/foot plus five percent of gross revenues; in Colleyville GTE pays a percentage of gross revenues, while Southwestern pays a flat fee; in Denton GTE pays a fee per line and Worldcom pays a fee per linear foot.

[24] On its face the Arizona Fiber Optics statute applies only to interstate facilities. Phoenix has been applying the statute to access facilities.

[25] CLECs do get a credit against the two percent utility tax levied by the City, so that the net disadvantage for CLECs vis a vis U S WEST is three and one half percent of gross revenues. With respect to the in-kind payments, CLEC GST estimates that it has contributed $79,000 toward this effort. In addition, this past summer it was informed that it must contribute to wiring the Tucson Convention Center at an estimated cost of about $69,000.

In addition to discriminatory fees, some municipalities have adopted other discriminatory practices. CLECS were origianlly told in Olympia, Washington that all their facilities must be placed underground. Subsequently they were told that all facilites must initially be aerial, but only until the city instructs all carriers in the corridor to put the facilites underground. In the meantime, U S WEST appears to be able to put its facilities either underground or in the air as it sees fit.

In Tacoma, Washington, one CLEC that wanted to construct facilities spent months attempting to gain city approval to allow them to construct their facilities. Because the city has not been able to reach a permanent agreement, the CLEC was forced to sign an interim agreement that was valid for only ninety days, only allowed them to build, but not operate, their facilities and specifically provided that the CLEC could not "operate" the system until there was a franchise in effect with the city. The agreement contains many onerous provisions including an obligation that the CLEC install whatever extra conduit the city manager, in his or her discretion decides is necessary, and requiring pre-approval of any transactions in the CLEC's stock that would change control of the company by 10% or more.[26] All these requirements exist with no guarantee that the CLEC would ever be able to operate this system. Of course, U S WEST has not been subject to such conditions.

The city council in Durham, North Carolina, is considering a new telecommunications ordinance. In the meantime, however, a new CLEC that wanted to use the public rights-of-way was asked to sign an "interim license" that, among other things, would require the CLEC to

[26] Puyallup, Washington, has similar restrictions on transfers of control of the carrier.

provide dedicated fibers to buildings owned by the City. The City has an existing franchise agreement with GTE. Under that franchise the only "in kind" requirement placed upon GTE is a requirement to allow the city the right to maintain city equipment upon the facilities of the Company's wire and pole fixtures, and free use of one duct or conduit in underground facilities (with certain exceptions for certain streets).

II. FEES NOT RELATED TO COSTS

As noted above, there are numerous types of fees (and in-kind payments) relating to construction permits and use of the rights-of-way that municipalities have levied on carriers.[27] In discussing such fees, it is important to keep in mind the different types of fees and the purpose for which they have been levied. ALTS is not generally challenging fees that are directly related to construction permit applications. If those fees are reasonably related to costs incurred by the municipalities in the construction permitting process and the municipalities costs of administering the permitting process, they are not likely to be found objectionable by carriers. However, fees that are not related to the additional burden that municipalities incur because of the permitting process or any burden that a carriers' usage of the right-of-way imposes ought not be charged to carriers.

There are many instances in which cities in the past few years have passed ordinances seeking to impose fees that are not even remotely related to the costs incurred by the cities.[28]

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[27] See footnote 15 supra.

[28] In addition to assessing fees that have no relationship to the costs incurred by the cities, a number of cities have conditioned the grant of a "franchise" on agreement from CLECs to accept "most favored nation" clauses that would ensure that the CLEC pay the city the highest

Most of these fees are based either on a percentage of the revenues of the carrier, the linear feet of rights-of-way occupied, or the number of access lines. Occasionally municipalities charge a flat fee. Most of the fees identified in the section above as being discriminatory also fall in this category of not being related to costs.

In addition to those noted above, perhaps the best example is that of Orangeburg, South Carolina, where BellSouth is the ILEC and only provider of service. The City of Orangeburg in 1998 enacted an ordinance that levies a tax of five percent of all gross receipts from all communications activities conducted in the municipality. In addition, the city is attempting to levy a five percent franchise fee on BellSouth and imposes a five percent fee on its revenues because it is a "foreign corporation." Thus, the city of Orangeburg is seeking to levy a total fee on BellSouth of fifteen percent of its revenues derived from providing service in the area. It is no wonder no other carriers are providing facilities-based service in Orangeburg. Clearly, the high fees the city is seeking to impose has limited competition in this instance.[29]

The city of Gary, Indiana, passed an ordinance in January of 1998 that allowed a fee of up to fifteen percent of gross revenues to be levied against all telecommunications providers. That ordinance was challenged by Ameritech, the trial court granted summary judgment for

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fee that it pays to any other city.

[29] BellSouth has filed suit against the city. See BellSouth Communications, Inc. v. City of Orangeburg, C/A No.: 98-CP-38-1110 (Court of Common Pleas, Orangeburg County, filed Nov. 23, 1998). BellSouth has also filed suit against the City of Seneca, in South Carolina, which is seeking to levy a 3 percent of revenue fee on BellSouth. See BellSouth Telecommunications, Inc. v. City of Seneca (8 98-3431 filed Nov. 23, 1998).

Ameritech and the Indiana Court of Appeals affirmed in relevant part.[30]

In University City, Missouri, NEXTLINK was presented with a proposed agreement that would have imposed an annual fee that would be the greater of (a) $1.90 per linear foot of underground facilities, (b) nine percent of NEXTLINK's gross revenues derived from its business within the city, (c) $1,250.00 or (d) the total of (1) five percent of the gross receipts derived from all of NEXTLINK's services originating and terminating end user to end user within the city and (2) three percent of a prorated portion of the gross revenues derived from end user to end user services that either (i) originate within the City but did not terminate within the City but did terminate within the greater St. Louis area or (ii) terminate within the City but did not originate within the City but do originate within the greater St. Louis area. This annual fee was distinct from the "license or occupational tax" of nine percent of annual gross receipts levied on all telephone companies operating in the City.[31]

The city council in Tacoma, Washington is attempting to levy several fees on telecommunications carriers that would add up to six percent of revenues. As indicated in the appendix attached hereto, U S WEST has filed suit challenging the imposition of such fees on it. U S WEST, in another forum, has claimed that it received a grant from the Wasington State Constitution to place its facilities within the public right-of-way and that it cannot be required to

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[30] City of Gary, Indiana v. Indiana Bell Tel. Co., No 45A03-9808-CV-333 (Ct. App. Ind., June 23, 1999). See Appendix attached hereto.

[31] NEXTLINK was having a similar problem with a neighboring city, the City of Maryland Heights, Missouri. See footnote 3 supra.

obtain a franchise under Washington law.[32]

As indicated above the Public Utility Commission in Texas last year completed a study of franchise agreements in the state. The data in the study show that there is very little correlation between the costs incurred by the cities and the amounts of money collected. Only about half the cities surveyed knew what the cost to the city was for managing the rights-of-way[33] and a few reported that the amount collected did not cover their costs. However, the majority of those that reported a cost and reported annual revenues had revenues that were substantially higher than the costs. Sometimes the revenues were as high as 20-30 times the cost to the city.[34]

In addition to requiring payments of money in the form of fees, many municipalities are requiring carriers to either construct facilities for the municipality or give the municipality free or reduced cost service. In Lacey, Washington, for example, the city requires one carrier to provide a two-inch conduit for internal city use at no charge whenever it lays new conduit. In Flint, Michigan one CLEC was recently told that it would not be allowed to construct facilities unless the CLEC would install cable to government offices and wire all the schools.[35] The city also

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[32] Answer of U S WEST in City of Auburn v. U S WEST Communications, No. C98-5595FDB (W.D. Wash. Filed Dec. 1, 1999).

[33] A number of cities reported "zero" costs, but there presumably are some costs at least in some years in those cities.

[34] For example, Mount Pleasant has administrative costs of $500 and revenues of over $70,000. Only one city, out of 129 reporting, claimed that revenues and costs were the same. As noted above, the Texas legislation will eventually alter the fees charged by these cities, but we have included a discussion of the study because it is illustrative of the type of information that we believe would be shown in other states were the studies to be conducted.

[35] See also discussion of the Durham, North Carolina interim license, p.16 supra.

wanted a 10% ownership interest in all of the CLEC's cable within the city. And the city of White Plains proposed to TCG that upon the termination of the franchise agreement, title to the facilities (including related equipment) would vest in the City, at no cost to the City. In addition, the City requested that TCG construct, at its own cost and expense, conduit to be used for municipal purposes.[36]

III. UNREASONABLE DELAY.

The Commission must make clear that municipalities may not "sit" on applications. A municipality should be required to act on an application to construct facilities in the public rights-of-way within a reasonable time of the submission of the application. ALTS suggests that a reasonable time would be 21-30 days from the submission of the application,[37] but the exact number (whether 21 days, 30 days or 45 days) is almost less important than the need to establish some period of time on which the carrier can rely. Too often carriers have submitted requests to the municipalities and then are forced to wait and wait and wait with no indication of when they will hear from the municipality. Quite obviously, this throws construction and planning schedules into a costly limbo.

Immediately after the passage of the 1996 Act several municipalities adopted either formal or informal moratoria on the grant of permits. Whether those moratoria were reasonable

[36] Other cities that have required CLECs to install conduit in addition to that which the CLEC had planned to install, include Scottsdale and Phoenix, Arizona and Olympia, Washington.

[37] We note that recent legislation in Ohio provides that consent to use rights-of-way may not be unreasonably withheld and that political subdivisions shall act on applications within 30 days after submission of the application.

at the time is, perhaps, debatable, but there is simply no reason at this time for municipalities to delay the consideration of permit applications. While some of the more egregious delays have disappeared (perhaps due simply to the passage of time), it is still not unusual for a carrier to wait for many months before obtaining a permit. A few recent examples are detailed below.

In the town of Colonie, New York, a CLEC submitted a check and permit application to the town on May 19, 1999. Throughout the months of June, July and August, the CLEC's employee and an engineering firm contacted the town to discuss the application and various options for the placement of the facilites on a regular basis. Numerous telephone calls went unanswered and it was not until after the CLEC had discussed the possibility of taking legal action to compel a decision by the town, that a permit was granted in mid-September. Of course, in this region of the country there is a very limited window for the construction of facilities and a delay of several months can put the construction in jeopardy.

As indicated in the suit filed by TCG against the city of White Plains, New York, TCG has been seeking permission from the City to construct and operate facilities since 1992. Although there was a long period in which TCG did not actively pursue its plans to construct facilities because of the burdensome requirements that White Plains was insisting upon[38] the company had been actively pursuing its application to construct facilities for over a year before it decided to file suit in the United States District Court for the Southern District of New York. To

[38] Apparently there was contact between TCG and the City during this period but TCG was not as actively pursuing permission as it did in 1998 and 1999. Because of the burdensome requirements, TCG changed their business plans and instead began providing service by reselling private line and switched telecommunications services.

ALTS knowledge that suit is still pending.

The St. Louis Metropolitan area consistes of numerous distinct municipalities, each of which imposes its own terms and conditions on the requesting CLEC. NEXTLINK's intitial backbone traverses eleven of these municipalities. The average negotiation period for NEXTLINK was seven months, including those municipalities that reached compromise agreemnets only after a lawsuit was filed against them. At one point a city official indicated that a negotiation period of four months was not considered lengthy to the city and indicated that the city negotiated with the cable company for three years before reaching agreement. Additionally, one particualrly non-responsive municipality resulted in NEXTLINK deciding to re-route its backbone to avoid traversing that city's rights-of-way.

V. ATTEMPTS TO REGULATE SERVICES

Despite the Commission's pronouncement two years ago that local regulations should not "reach[] beyond traditional rights-of-way matters and seek[] to impose a redundant 'third tier' of telecommunications regulation . . . govern[ing] the relationships among telecommunications providers, or the rates, terms and conditions under which telecommunications service is offered to the public,"[39] a number of communities continue to attempt to apply such a third tier of regulation. Rockville, Maryland and Prince Georges Counties in Maryland are examples of local governments that have overstepped the bounds of appropriate regulation. Their ordinances purport to require CLECs to file rates with them for approval. This, of course, would be in addition to any approval already procured from the state or federal government. In addition, the

[39] TCI Cablevision of Oakland County, Inc., FCC 97-331 at ¶ 105 (rel. Sept. 19, 1997).

franchise agreement that the City of White Plains proposed to TCG contained a statement that the franchise is a "grant to provide services pursuant to the terms herein" when the city has no authority to regulate the services of a telecommunications carrier. White Plains also sought to require TCG to obtain permission from the City prior to constructing facilities on private property, to give substantial information of the services offered and the number of customers served, and to give the financing plans for the operation of the telecommunications system.

In Florida, two counties recently attempted to regulate the services provided over facilities within their boundaries. For example, Collier County attempted to pass an ordinance that would have required a license for any telephone company to "operate" any telecommunications facility in the county rights-of-way, that would have required the annual filing of all tariffs and modifications, and that would have imposed restrictions on the transfer of control of a telecommunications company or its assets and regulating affiliated transactions. And the Leon County Board drafted an ordinance that would have required applicants to submit information on the services to be provided over facilities and any other information that the County Attorney deemed reasonably necessary.

The City of Clayton, Missouri ordinance contains provisions that attempt to govern CLEC;s business procedures and customer care relationships. In addition the ordinance pruports to authorize the city to regulate the rates of CLECs.

The Springfield, Oregon ordinance provides that "[a] telecommunications license shall be required of any telecommunications carrier . . . who desires to provide telecommunications services . . . to persons in the City or to persons or areas outside the City using facilities located

in the City. Carriers who utilize facilities of another licensed carrier for the distribution of their services shall be required to have a separate license." The license application requests information on all affiliates of the applicant, a description of the services to be provided, information on the applicant's technical qualifications and "experience and expertise regarding the . . . services described in the application." The factors that the Public Works Director is to consider in determining whether to grant the application include "the ability of the applicant to provide services to the community and region" and "[s]uch other factors as may demonstrate that the grant to use the public ways will serve the community interest." Clearly this ordinance oversteps the bounds of reasonable time, place and manner regulation of use of the public rights-of-way.

CONCLUSION

Because the problems that ALTS has identified above are not isolated, but occur in significant numbers and in all areas of the country, the Commission must take action to ensure that municipalities discontinue the overly burdensome, overly regulatory actions that they have taken in the name of management of the rights-of-way. While the municipalities actions have often had a greater and disproportionate affect on competitive carriers, as opposed to the incumbents, all carriers have been affected to some extent by the wave of new ordinances. And, should the Commission not take immediate and strong action, the municipalities will continue to try to balance their books on the backs of the telecommunications industry.

Therefore, the Commission should articulate and adopt in a declaratory ruling the following principles:

1. Local rights-of way management must be administered in a nondiscriminatory and competitively neutral manner. Therefore, any local requirements must be imposed under ordinances, regulations and rules of general application. Any requirement or fee that applies to one category of carrier that does not apply to another category of carrier is presumptively discriminatory and preemptable under Section 253 of the Telecommunications Act of 1996 and general principles of federal preemption. The Commission should also make it clear that it stands ready to act expeditiously on any case brought to its attention.

2. Municipalities must rule on applications to construct facilities within a reasonable period of time (30 days is presumptively reasonable) and may not unreasonably deny carriers permission to construct facilities in the municipal rights-of-way.

3. Regulation of interstate telecommunications services is under the exclusive jurisdiction of the Federal Communications Commission and may not be regulated in any manner by a state or a political subdivision thereof unless the Federal Communications Commission has explicitly delegated authority thereto. With respect to intrastate services, state laws control, but a locality may not regulate intrastate communications in any manner unless there is explicit state statutory authority to do so (and, of course, such regulation may not be inconsistent with federal rules and requirements).

4. Municipal regulation of use of the rights-of-way is limited to reasonable regulation of the time, place and manner of construction of facilities. This would include such things as preservation of the physical integrity of streets and highways, control of the orderly flow of vehicles, coordination of construction schedules, and determination of reasonable bonding and indemnity requirements. This would not include such things as regulation of services, information requirements that are unrelated to the scope of the proposed construction, or any interconnection requirements.

5. Fees relating to the use of public rights-of-way should be limited to recovery of the actual costs of administering the rights-of-way and ensuring appropriate restoration of the rights-of-way. To the extent that performance or other bonds are required, they must be limited to the amount necessary to ensure compliance with restoration requirements. All such fees must be publicly disclosed and should be recovered in a competitively neutral manner.

The Commission should also consider appointing an ombudsman within the Enforcement Bureau to quickly solve issues that arise between carriers and states or localities over the

management of rights-of-way and take whatever other action is appropriate to ensure that local governments understand and abide by the federal policies designed to ensure nondiscriminatory, fair and reasonable treatment by local governments, while protecting those governments valid interests in ensuring the health and safety of their citizens.

Respectfully submitted,

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Appendix A

Recent Cases Filed or Decided Raising Issues as to the Lawfulness of Various Municipal Regulations Relating to Carrier Use of Public Rights of Way (Does not include Cases Mentioned in the Commission's NOI)

U S WEST Communications v. City and County of Denver, No. 98 CV 691 (Dist. Ct., City and County of Denver). After passage of the Colorado state statue limiting the fees that municipalities could charge carriers, the City of Denver passed a new ordinance requiring telecommunications providers to obtain a "Private Use Permit" in order to use the Denver public rights-of-way and to pay an annual per footage fee for conduit in place in the rights-of-way or a percentage of revenues fee. A number of carriers sued the city and the trial court has found the ordinance to be void and unenforceable.

NEXTLINK of Missouri, Inc. v. City of Maryland Heights, Civ. Act. No. 4:99 CV01052CET (E.D. Mo., filed June 29, 1999). In this case NEXTLINK filed suit against two municipalities in the St. Louis, Missouri area seeking an injunction compelling Maryland Heights to permit NEXTLINK to offer services and use the rights of way in the city and preventing University City from imposing illegal fees and terms and conditions on NEXTLINK as a condition of using the public rights of way to provide service. In Maryland Heights, NEXTLINK attempted for more than 7 months to obtain permission to construct facilities and offered to adhere to any rights-of-way restrictions and pay any fees paid by the incumbent, Southwestern Bell. The city refused and failed to make any counterproposal, although it made it clear that compensation was an issue. University City would not permit NEXTLINK to provide service unless it paid a recurring fee that Southwestern Bell does not pay. University City has agreed to settle on terms and

conditions that were similar to those reached by other municipalities in the area, but which included a fee for use of the rights-of-way, a fee that is not imposed on Southwestern Bell. Likewise, Maryland Heights settled the preliminary injuction, on an interim basis, with an agreement that treats NEXTLINK similarly to Southwestern Bell with respect to recurring fees for the use of the rights-of-way.

BellSouth Telecommunications, Inc. v. City of Seneca, No. C/A No. 8:98-3451-13 (D.S.C. filed Nov. 23, 1998). BellSouth has sued the City of Seneca seeking an injunction against an ordinance adopted in May of 1998, which seeks to assess a 3 % tax on all gross revenues of communications carriers. BellSouth has argued that the fee violates Section 253 of the Telecommunications Act of 1996. The tax imposed by the city in this particular case was styled as a business license and was not, at least on the surface, connected to any use of the rights-of-way. We include it here because BellSouth has argued that the tax is violative of the provisions of Section 253 and it is another example of the cities trying to balance their books on the backs of telecommunications carriers.

TCG New York, Inc. v. City of White Plains, 99 Civ 4419 (S.D.N.Y. filed June 18, 1999). In this case TCG alleges that it has been attempting to obtain permission from the city to construct and operate facilities since 1992. The City wanted TCG to sign an agreement that contained an annual fee of 5 percent of revenues (with a minimum of $5,000 to $8,000) and a vesting of the facilities in the City at no cost to the City at the termination of the agreement. The city explained to TCG that by law it is required to present to TCG the same agreement that the City has with Metromedia, but the city has not required NYNEX to enter into any agreement with the City. As far as TCG has been able to determine NYNEX has no franchise from the City.

City of Gary, Indiana v. Indiana Bell Tel. Co., No. 45A03-9808-CV-333 (Ct. App. Ind. June 23, 1999). The Indiana Court of Appeals affirmed a lower court grant of summary judgment against an ordinance that adopted a "requirements-based fee" that was to be calculated in one of three ways: (1) based upon an assessment of the City's "requirements" (2) based upon a percentage not to exceed 15% of the providers' gross revenues, or (3) based upon a "growth factor" calculated from the providers' telecommunications revenues multiplied by the previous year's requirements-based fee.

AT&T Communications of the Pacific Northwest, Inc. v. City of Eugene, Oregon, Case No. 16-98-12672 (Or. Cir. Ct. March 1, 1999) (granting AT&T's Motion for Summary Judgment). On a motion for summary judgment, the court found the Eugene rights-of-way ordinance to be an illegal tax under state law and a barrier to entry under the Section 253.

Cablevision of Boston, Inc. v. Public Improvement Commission of the City of Boston, No. 99-1222 (1st Cir. Aug. 25, 1999). The First Circuit upheld the denial of a preliminary injuction against allegations by Cablevision that the City of Boston had failed to manage the conduit rights-of-way in a competitively neutral and nondiscriminatory manner in violation of Section 253(c). The Court assumed arguendo that Cablevision had a Section 253(c) cause of action and that Section 253(c) requires municipalities to manage their rights-of-way on a competitively neutral and nondiscriminatory basis (although it indicated that such an assumption was not without doubt) but upheld the lower court upon concluding that Cablevision was unlikely to prevail on its allegations that the City had acted in a discriminatory manner.

City of Chattanooga v. BellSouth et al, Dock. No 96-CV-1155 (Cir. Ct. Hamilton County, Tenn. Jan 4, 1999). Previously a United States District Court had held that the 5% Chattanooga fee

was in fact a tax. After the U.S. District Court remanded the case (based upon the argument that the federal court lacked subject matter jurisdiction under the Tax Injunction Act, 28 U.S.C. § 1341), the state court also concluded that the fee was an illegal tax adopted purportedly under the City's police powers. The Court held that any fees enacted under the City's police powers "must bear a reasonable relation to the thing being accomplished and the amounts collected must not be disproportionate to the expenses involved." The Court distinguished the power that the municipality would have acting either under its proprietary capacity or in its governmental capacity (police powers).

U S West Communications, Inc. v. Redwood Falls, 558 N.W.2d 512 (Minn. Ct. App. 1997). In this case the Minnesota Court of Appeals found that under state law local governments lack the authority to require a telephone company to obtain a franchise (or pay a "franchise" fee") or to enforce a requirement that the carrier encase its fiber optic lines in concrete duct. The City's power was limited to the regulation of the location of poles and other facilities so as to prevent the interference with the safe use of the public rights-of-way.

City of Hawarden v. U S West Communications, Inc., No. 4/97-544 (S. Ct. Iowa, March 24, 1999). The Supreme Court in Iowa confirmed a lower court ruling that an ordinance that sought to charge a recurring 5% fee on U S West (but not on a city owned telecommunications system) for use of the rights-of-way was, in fact, an illegal tax. The Court stated: "The district court . . . correctly recognized that the municipality may recover a fee for managing its public rights-of-way but, under the Telecommunications Act of 1996, such compensation must be "reasonable" and imposed in a "competitively neutral and nondiscriminatory basis" [It is obvious that a] fee] imposed without regard to administrative costs and exempting the city, as a telecommunications

provider, from its coverage is neither reasonable nor nondiscriminatory in its application."

U S WEST Communications, Inc. v. City of Tucson, TX 98-00455 (filed Nov. 12, 1998 Ar.Tax Ct). The City of Tucson adopted Ordinance No. 8998, which became effective January 1, 1998, levies upon carriers a tax in the amount of 1-1/2% of the gross income, on top of an existing "public utility tax" of 2% of gross revenues. In addition, there is an existing "right-of-way rental fee" in the amount of 3-1/2% of the carriers gross revenues. U S WEST sought an injunction against the right-of-way tax claiming that it was invalid, unreasonable, excessive and unconstitutional.

City of Auburn v. U S WEST Communications, Inc., C98-5595FDB (filed _____ W.D. Was.). Auburn and several other cities in Washington sued U S WEST for refusal to pay the costs of relocating facilities. U S West has counterclaimed against the cities of Auburn, Des Moines, Olympia, Tacoma and University place claiming that the telecommunications ordinances recently passed by each of the cities violate Section 253(a) of the Telecommunications Act of 1996.

Appendix B

State Legislative Initiatives

Colorado (S.B. 10)

In 1996, the Colorado legislature enacted SB 10 which provided that any carrier operating under authority from the FCC or the Colorado PUT requires no additional authorization or franchise by any municipality to conduct business within that area and that no municipality has the jurisdiction to regulate telecommunications providers based upon the content, nature or type of communications service they provide, except to the extent granted by federal or state legislation. The legislation also granted to any telecommunications provider the right to construct and operate telecommunications facilities upon any public right-of-way in Colorado. In addition, the legislation limits the fees that a municipality may charge carriers and provides that all fees and charges must be reasonably related to the costs directly incurred by the municipality in providing services related to the administration of construction permits. Finally the legislation prohibits municipalities from collecting any "in-kind" services from telecommunications carriers.

Minnesota

In 1997 the Minnesota legislature adopted a statute governing the management and use of public rights-of-way and directed the PUC to develop and adopt rules implementing the statute Chapter 123, Laws, 1997. The statute limits the actions that local governments may take in managing their rights of way (limiting the information that can be sought in reviewing permitting

requests) and limits the fees that a local government may charge carriers. Specifically fees must be based "on the actual costs incurred by the local government unit in managing the public right-of-way. The local governments are specifically prohibited collecting a fee imposed through the provision of in-kind services by a carrier and are specifically prohibited from requiring a carrier to "obtain a franchise or pay for the use of the right-of-way. In 1999, the State PUC adopted rules implementing the Minnesota law.

Indiana

H.B. 1376, which was signed into law on 3/13/98, provides that municipalities may require fair and reasonable compensation on a competitively neutral basis for occupation of the public rights-of-way. The compensation may not exceed the city's direct actual and reasonably incurred costs of managing the rights-of-way and may not include rents, franchise fees or any other fee. In addition, cities may not unreasonably delay a carriers access to the rights-of-way. Finally, the Indiana Utility Regulatory Commission has authority over unreasonable municipal ordinances.

New Jersey

Section 54:30A-124 of the New Jersey Statutes, adopted in 1997, provides that no local government may "impose any fee, taxes, levies or assessments in the nature of a local franchise, right-of-way, or gross receipts fee, tax levy or assessment against . . .telecommunications companies. Nothing in this section shall be construed as a bar to reasonable fees for actual services made by any [local government]"

North Dakota

HB 1451 provides that a municipality may not impose a fee other than a fee for management costs without a vote of the people. Management costs are limited to the direct actual costs incurred in exercising police powers. A political subdivision may not require in-kind services as a condition for the use of the public right-of-way.

Ohio

H.B. 283, sometimes referred to as the Omnibus Budget Bill of 1999, was signed into law in July of 1999. New section 4939.01 through 4939.04 of the Ohio Revised Code address municipal rights-of-way issues. In particular, these sections provide that consent for the use of a public right or way shall be based on the lawful exercise of the police power and shall not be unreasonably withheld nor shall any preference or disadvantage be created through the granting or withholding of consent. Municipalities are required to "grant its consent . . . within thirty days after the date" an application is filed. In addition, municipalities are prohibited from levying a tax, fee or charge (including any non-monetary compensation or free service) for the right or privilege of using a public right-of-way for the provision of telecommunications services. The municipality may charge a carrier a permit fee but such a lee must be limited to the recovery of the direct incremental costs incurred by the municipality in inspecting and reviewing any plans and specifications and in granting the associated permit. Carriers are required to "restore the public way to its former state of usefulness."

South Carolina

On June 30, 1999, the Governor signed H. 3276. The statute attempts to limit any fees so

that they apply equally to ILECs and CLECs (although it does it an a somewhat round about manner) The statute provides that a municipality may charge a recurring fee (called a "franchise or consent fee") up to a maximum of $1000 per annum and an administrative fee up to $1000 per annum. There is an exception to the "franchise or consent" fee for any "telecommunications company" that "has an existing contractual, constitutional, statutory, or other right to construct or operate in the public streets and public property including, but not limited to, consent previously granted by a municipality" but the administrative fee applies to any telecommunications company that "is not subject to subsection (A)" (which is the "franchise or consent" fee). Thus, the statute allows the municipalities to charge both the ILECs and the CLECs a maximum recurring fee of $1000, but under different nomenclature.

Any business license tax for the years 1999 through 2003 may not exceed three tenths of one percent of gross revenues derived from the sale of retail telecommunications services for the preceding year. After the year 2003, the business license tax may not exceed the lesser of seventy-five one hundredths of one percent of gross income derived from retail telecommunications services or the maximum business license tax as calculated by the Board of Economic Advisors. Any business license tax levied by the municipality "must be levied in a competitively neutral and nondiscriminatory manner upon all providers of retail telecommunications services."

The statute also limits the ability of the municipalities to assert or exercise regulatory control over matters within the jurisdiction of the Public Service Commission or the FCC.

Despite the numerous statements throughout the statute regarding nondiscrimination, there is a section that discriminates significantly against some carriers. Section 58-9-2260

provides that no municipality may enforce an ordinance or practice that is inconsistent with the provisions of the statute except that "any municipality which had entered into a franchise agreement . . . with a telecommunications provider prior to December 31, 1997, may continue to collect fees under the franchise agreement . . . through December 31, 2003 . . . regardless of whether the franchise agreement or contractual agreement expires prior to December 31, 2003." And, such agreements that expire after December 31, 2003, can be enforced until the termination date. Finally, any municipality that had a business license fee in effect . . . . Thus, many of the older CLECs may be severely disadvantaged in South Carolina

Iowa Bill No. S.B. 2368 (1998)

In 1998, the Iowa legislature amended its code to remove cities' ability to grant franchises to persons providing telephone service.

Texas

A new Texas statute, which took effect on September 1, 1999, after lengthy negotiations between interested parties, attempts to establish a uniform method of compensating municipalities for the use of public rights-of-way by carriers and to limit municipal regulation of carriers to those regulations reasonably necessary to protect the health, safety and welfare of the public. Compensation is established through a "base amount" which is established in the statute for various categories of cities and then allocated on a per-access line basis for recovery from end users. This fee is the only fee that cities may charge carriers. Pursuant to the statute, the PUC initiated Docket no. 20935 to adopt rules for the implementation of the Act

Appendix C

PRINCIPLES SUBMITTED TO THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL

May 2, 1998

American Legislative Exchange Council
Ad Hoc Committee on Regulatory Reform and Taxation
Senator David Nething, Chair
910 Seventeenth St. NW
5th Floor
Washington DC 20006

Dear Senator Nething:

The Telecommunications Act of 1996 ("The Act") requires state and local governments to treat all telecommunications providers in a non-discriminatory and competitively neutral manner. In addition, an underlying purpose of the Act is to allow all citizens of the United States of America to acquire any telecommunications service and to encourage the development of advanced telecommunications services at affordable prices. The Act recognizes the detriment which local regulation of telecommunication services and inappropriate regulation of rights-of-way would have toward accomplishing these goals.

The Telecommunications Industry Ad Hoc Rights-of-Way group has developed guiding principles to be utilized as the industry works in partnership with state and local governments to successfully implement the respective sections of the Act. On behalf of this group, enclosed is a copy of these principles for your review and support.

The Telecommunications Industry Ad Hoc Rights-of-Way Group is currently made up of the following companies and organizations:

360° Communications	BellSouth	Sprint
AT&T Corporation	Frontier Communications	SBC Communications
ALTS	IXC Communications, Inc	US WEST Communications
Ameritech	GTE	USTA
	MCI	

All participants of the group have endorsed these principles.

The industry looks forward to working with your organization in furtherance and support of these principles. If any of our group participants can be of assistance please call that person on the attached list or the ALEC Private Sector Member.

Very truly yours,

David L. Mielke, Chair
Telecommunications Industry Ad Hoc Rights-of-Way Group

TELECOMMUNICATIONS INDUSTRY AD HOC RIGHTS-OF-WAY COMMITTEE RIGHTS-OF-WAY POLICY PRINCIPLES
5/2/98

The ready availability of telecommunications services to all in a robust competitive environment is critical to local, state and national economies. It is imperative that access to public rights-of-way necessary for deployment of telecommunications facilities be provided in a reasonable, predictable, non-discriminatory and competitively neutral manner. As a result of the recent proliferation of locally-imposed regulations adversely impacting provision of telecommunications services, the telecommunications industry has joined in proposing the following principles to guide state and local telecommunications policies.

1. Municipal rights-of-way management requirements must be imposed and administered in a non-discriminatory, competitively neutral manner.

The federal Telecommunications Act of 1996 ("the Act") preserves local rights of way management authority as long as it is administered in a non-discriminatory and competitively neutral manner. The only practical way to ensure this standard is being met without impairing local government powers with respect to public safety is to ensure that all rights-of-way management requirements are imposed under ordinances, regulations and rules of general application; are administered in a non-discriminatory and timely manner; and are imposed equally upon all users with facilities in the rights-of-way regardless of whether they are public or private entities.

2. Any general revenue taxes must be set at the state level. Charges imposed by local governments should be limited to reimbursement of the cost of rights-of-way administration.

Local charges are being imposed to raise general revenue on terms varying widely among localities and among service providers. Arbitrary competitive disadvantages and disincentives to infrastructure investment such as delay, uncertainty, reduction of funds available for investment and diversion of revenue are impeding the provision of modern telecommunications services to the public. Local requirements should be publicly disclosed, limited to reimbursement of rights-of-way administration-related costs and ensuring public safety and appropriate restoration of affected rights-of-way. Furthermore, local requirements should be imposed equally upon all users with facilities in the rights-of-way regardless of whether they are public or private entities.

3. Any regulation of telecommunications services and operations should be at the state (or federal) level - not at the local level.

Largely as a result of attempts by local governments to apply cable TV-type franchise agreements to telecommunications companies, rights-of-way management terms are being negotiated on a case-by-case basis. These attempts to regulate telecommunications services at the municipal level are resulting in disparate treatment among carriers and among other infrastructure providers; delays in the provisioning of service; unnecessary cost increases to consumers and a patchwork of varying locally imposed requirements. It is critical that regulations be standardized at the state level and based on sound public policy. Local rights-of-way ordinances should be limited to reasonable time, place and manner requirements.

Every state should consider legislation that updates and clarifies the rights, duties and obligations of municipalities and telecommunications carriers in accordance with these principles and the Act.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 1999, copies of the foregoing Comments of the Association for Local Telecommunications Services were served by hand to the parties listed below.

Emily M. Williams

Emily M. Williams

Magalie Roman Salas (original and 6 copies)
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